

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY CUPPLES,

Plaintiff/Counterdefendant-
Appellant,

and

TERRY CUPPLES,

Plaintiff-Appellant,

v

EVERGREEN ESTATES, INC.,

Defendant/Counterplaintiff-
Appellee,

and

JAMES JACQUES,

Defendant-Appellee,

and

HECKAMAN MANUFACTURED HOMES
CORP., a/k/a CRAFTTECH BUILDING SYSTEMS,
INC.,

Defendant.

UNPUBLISHED

March 16, 2004

No. 243689

Hillsdale Circuit Court

LC No. 00-001119-CK

TIMOTHY CUPPLES,

Plaintiff/Counterdefendant-
Appellant,

v

No. 245650

Hillsdale Circuit Court

Defendant/Counterplaintiff-
Appellee,

and

JAMES JACQUES and HECKAMAN
MANUFACTURED HOMES CORP., a/k/a
CRAFTECH BUILDING SYSTEMS, INC.,

Defendants.

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In Docket No. 243689, plaintiffs, Timothy Cupples and Terry Cupples, appeal as of right from the trial court's orders directing a verdict and entering a judgment of no cause of action in favor of defendant, Evergreen Estates, Inc. (Evergreen), and directing a verdict and entering judgment in favor of Evergreen on its counter-claim against Timothy. Additionally, plaintiffs contest the trial court's order granting partial summary disposition in favor of defendants, Evergreen and James Jacques. In Docket No. 245560, Timothy appeals as of right from the trial court's order awarding costs and attorney fees in favor of Evergreen. We affirm.

I. Material Facts

In this case, Timothy contracted with Evergreen for the purchase of a manufactured home, to be built, delivered, and set up on certain property located in Pittsford. Neither Timothy nor his brother, Terry, appeared for trial on the first day. Following jury voir dire, plaintiffs' counsel contacted plaintiffs, and they informed him that they were on their way to the trial.

Following the testimony of the first witness, plaintiffs' counsel indicated that he was at an "impasse," because plaintiffs were not present. The trial court permitted an early lunch recess in order to accommodate plaintiffs. After the proceedings reconvened, defendant brought a motion for a directed verdict because there were no additional witnesses, and plaintiffs had not appeared. Plaintiffs' counsel acknowledged that plaintiffs were not present, and stated that he was unsure if they were coming at that point and that the remaining witnesses had been subpoenaed for the following day. Plaintiffs' counsel informed the court that notice of the proper trial date and times had been provided to plaintiffs, and that he could not explain why plaintiffs believed the trial was not starting until August 8, 2002.

In response to defendant's motion for directed verdict, plaintiffs' counsel responded that without Timothy's and Terry's testimony, he was unable to meet the burden of proof regarding whether Evergreen breached the contract. The trial court then granted Evergreen's motion for a directed verdict.

Evergreen also brought a motion for directed verdict on its counterclaim against Timothy for breach of contract. Plaintiffs' counsel acknowledged that evidence had been presented regarding the amount requested in the counterclaim, and stated that there were no defenses available absent Timothy's or Terry's testimony. Subsequently, the trial court also granted Evergreen's motion for directed verdict on its counterclaim.

II. Directed Verdict

Plaintiffs first argue that the trial court erred in granting Evergreen's motions for directed verdict. We disagree.

"This Court reviews de novo the grant or denial of a directed verdict." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). This Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, and all inferences and conflicts are resolved in the nonmoving party's favor in determining whether a question of fact existed. *Id.* "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Id.* at 679-680.

Plaintiffs first argue that the trial court prematurely granted Evergreen's motion for a directed verdict. We disagree. The record demonstrates that neither Timothy nor Terry appeared for trial. Despite plaintiffs' failure to appear, the court proceeded with trial, noting that a civil plaintiff's presence was not required and that plaintiffs' counsel could continue with preliminary matters. Although the trial court attempted to accommodate plaintiffs, they did not appear.

On appeal, plaintiffs provide no reasoning for their absence at trial, and merely contend that they were the material witnesses necessary to support their claim against Evergreen. Plaintiffs further claim that they were denied the ability to present evidence in their case; however, this argument ignores the fact that they were denied the opportunity to present evidence due to their own conduct, rather than by any action by the trial court. As stated in MCR 2.515, "[a] party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. . . ." Although plaintiffs' counsel indicated that witnesses were scheduled for the second day of trial, he was unable to present any additional evidence on the first day of trial. This, combined with the fact that plaintiffs made no attempt whatsoever to further delay the trial or to demonstrate good cause for their absence,¹ demonstrates that the trial court did not err in granting Evergreen's motion for a directed verdict and dismissal.

Plaintiffs also argue that the evidence presented demonstrated a factual dispute, which rendered a directed verdict improper. However, plaintiffs' counsel specifically stated on the record, "Your Honor, without my client's testimony or his brother's testimony it's – there's no way for me to prove – to carry the burden of proof on whether Evergreen Estates breached the

¹ Although plaintiffs contend that they had not been informed of the proper trial date, nothing in the record indicates such a proposition.

contract.” Plaintiffs cannot now claim error on an issue conceded below. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 38; 666 NW2d 310 (2003). Additionally, with respect to Evergreen’s counterclaim, plaintiffs’ counsel stated, “Your Honor, I believe as far as the countercomplaint goes, in his direct exam that I did we have introduced [sic] the invoice and he’s made a statement on the amount that he claims in the countercomplaint. I don’t have any other defenses against that without my client’s testimony.”

Further, plaintiffs have provided no evidence to support their argument that Evergreen breached its contract with Timothy. As a general rule, a cause of action for a breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003). Plaintiffs merely recite portions of Evergreen president James Jacques’ testimony, and then state that Jacques’ testimony presents an issue of fact regarding the breach of contract claim. Plaintiffs fail to argue how this testimony demonstrates a breach of any of Evergreen’s obligations under the contract, and fail to relate any of the testimony to specific contractual obligations. In light of these deficiencies, we find that plaintiffs have failed to demonstrate that there was sufficient evidence presented at trial that would permit the breach of contract claim to go to the jury.

Plaintiffs further contend that the trial court should have ordered a continuance after plaintiffs failed to appear for trial. However, plaintiffs’ counsel made no request for an adjournment of the proceedings, as required by MCR 2.503. This issue is therefore not properly before this Court because it was not raised before or addressed by the trial court. *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003).²

III. Summary Disposition³

Plaintiffs next argue that the trial court erred in dismissing their claims for breach of contract, negligence, and for violations of the Michigan Consumer Protection Act (MCPA). We disagree.

This Court reviews de novo the trial court’s grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants’ motion for summary disposition regarding plaintiffs’ negligence claim⁴ was granted pursuant to MCR 2.116(C)(8). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of the complaint. *Id.* at 119. “All well-pleaded factual allegations are accepted as true and construed in

² Even if we were to review this issue, plaintiffs have provided no authority imposing a duty on the court to sua sponte order an adjournment.

³ For purposes of this issue, the term “defendants” refers to Evergreen and Jacques.

⁴ Although the trial court’s order indicates that defendants’ motion for summary disposition was granted pursuant to MCR 2.116(C)(10), it is evident that the trial court also determined that plaintiffs’ complaint was insufficient on its face because it failed to contain specific factual allegations to support their claim for violations of the MCPA.

a light most favorable to the nonmovant.” *Id.* The trial court may grant a motion for summary disposition under this subsection only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* “When deciding a motion brought under this section, a court considers only the pleadings.” *Id.* at 119-120.

Defendants’ motion for summary disposition regarding plaintiffs’ claims for violations of the MCPA, Terry’s claim for breach of contract, and Timothy’s claim for loss of income and/or loss of business opportunity were granted pursuant to MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, where the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the summary disposition motion. *Id.* “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.*

A. Negligence

Plaintiffs first argue that the trial court erred in dismissing their negligence claim, and contend that the negligent performance of a contract may constitute both a tort as well as a breach of contract. To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant’s breach of duty proximately caused the plaintiff’s injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In order to maintain an action sounding in tort, a plaintiff must also allege the violation of a legal duty separate and distinct from the contractual obligation. *Rinaldo’s Construction Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). A plaintiff may, however, without alleging a legal duty distinct from the duties arising out of the contractual relationship, state a claim in negligence if the defendant’s conduct constitutes tortious activity that causes physical harm to persons or tangible property. *Id.* at 85.

Here, plaintiffs allege that defendants owed them a duty to properly build, deliver, and setup their home within a reasonable time period. The duty alleged by plaintiffs is not distinct from defendants’ contractual duties, which were to properly build, deliver, and set the home within a reasonable time. As plaintiffs fail to allege a legal duty distinct from defendants’ contractual obligations or that defendants’ conduct constituted tortious activity that caused physical harm to persons or tangible property, the trial court properly granted defendants’ motion for summary disposition.

B. MCPA

Plaintiffs next contend that the trial court erred in dismissing their claim for violation of the MCPA. We find that the trial court properly dismissed plaintiffs’ claim for violations of the MCPA on the grounds that plaintiffs failed to plead with specificity or to support their claim with factual allegations. Plaintiffs’ complaint did not provide any factual allegations in support of their claim for violations of MCPA. “Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.” *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Nor did plaintiffs provide the trial court with sufficient argument or support in opposition to defendants’ motion for summary disposition from which the court could find that plaintiffs stated a claim. Finally, plaintiffs’ argument on appeal is

likewise insufficient, because plaintiffs merely repeat that there was a legal basis for their MCPA claim, without demonstrating in any way what sort of factual basis there is in support of their claim. Plaintiffs may not leave it to the trial court or to this Court to find a factual basis in support of their position. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Accordingly, the trial court properly granted summary disposition in favor of defendants on plaintiffs' MCPA claim. MCR 2.116(C)(8).

C. Loss of Profits/Loss of Business Opportunity

Plaintiffs also argue that the trial court erred in dismissing their claim for damages for loss of profits and/or loss of business opportunity. Specifically, plaintiffs contend that Timothy was denied the benefits of a potential business opportunity from his employer, K & R Machinery Service, Inc. (K & R).

As stated in *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6; 516 NW2d 43 (1994), "damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made." Additionally, "[a]pplication of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Id.* However, this general rule is inapplicable if the parties contemplated the damages. *Id.* at 7. Similarly, the Uniform Commercial Code (UCC) applies this principle in the limitation of consequential damages:

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [MCL 440.2715.]

Michigan applies an objective approach to determine the foreseeability of contract damages, regardless of whether basic contract principles or UCC principles are utilized, which requires that the damages requested "can *reasonably* be said to have been in contemplation of the parties at the time the contract was made." *Lawrence, supra* at 12-13.

We find that plaintiffs failed to demonstrate that a genuine issue of material fact exists regarding their claim for consequential damages. Here, although it is clear from Jacques' deposition testimony that he knew plaintiffs intended to use the home for some business purpose, there was no indication that Jacques was made aware of the time sensitive nature of the business opportunity itself. At most, the evidence demonstrates that plaintiffs informed Jacques that they wanted to be in the house as soon as possible. In fact, Timothy's deposition testimony reveals that he did not share the specific details of the potential business opportunity with Jacques. Accordingly, the trial court properly granted defendants' motion for summary disposition with respect to plaintiffs' claim for consequential damages.

IV. Contract Date

Plaintiffs next argue that the trial court erred in determining that the transaction between Evergreen and Timothy was governed by the August 11, 1999, contract. We disagree.

This issue involved a preliminary question of law before the trial court, i.e., whether the August 11, 1999, contract was clear and unambiguous, and whether that contract was the governing document in this case. This Court reviews a trial court's conclusions of law de novo. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651-652; 662 NW2d 424 (2003).

On appeal, plaintiffs claim that the trial court erred in determining that the transaction⁵ entered into between Evergreen and Timothy was governed by the August 11, 1999, contract, and because it did not allow parol evidence to determine the "true intent" of the parties to the contract. Plaintiffs also contend that the trial court erred in determining that the August 11, 1999, contract was clear and unambiguous. Plaintiffs have not provided any analysis or law for their position that the August 11, 1999, contract did or did not govern the transaction.

Regardless of plaintiffs' contentions, the focus of their argument is on the trial court's failure to permit parol evidence regarding the parties' intent with respect to the delivery date, which was not included in the August 11, 1999, contract. However, plaintiffs do not rely on the applicable provisions of the UCC regarding the usage of such parol evidence. See MCL 440.2202; MCL 440.2204(3). Specifically, the crux of plaintiffs' argument is that the evidence regarding the terms of the original contract was necessary to determine the proposed delivery date in the second contract, which was left blank. Plaintiffs ignore the fact that they agreed at the motion hearing that when there is no date contained in the contract, the law implies that delivery be made within a reasonable time. See also MCL 440.2309(1)("[t]he time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon *shall* be a reasonable time."). Plaintiffs have failed to contradict this principle, and have failed to provide any analysis to demonstrate why this provision should not have applied in this case. Additionally, plaintiffs have failed to argue or provide any analysis in support of their theory that parol evidence should have been permitted to ascertain the parties' intent regarding the amended contract. Because plaintiffs have failed to demonstrate why parol evidence should be permitted pursuant to the statute, plaintiffs' argument fails.

V. Amendment of the Complaint

Plaintiffs next assert that the trial court should have permitted them to amend their complaint pursuant to MCR 2.116(I)(5). However, plaintiffs fail to provide any analysis in support of this argument. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority

⁵ As plaintiffs point out, the contract at issue is governed by article 2 of the UCC. A manufactured home is a movable and identifiable type of good at the time of the sale, MCL 440.2105(1), and the sale in this case is predominately one for goods rather than services; hence, this transaction is governed under the UCC. See generally, *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992).

either to sustain or reject his position. . . .” *Wysocki v Felt*, 248 Mich 346, 360; 639 NW2d 572 (2001) (citation omitted).

Although we need not address this issue, we further note that plaintiffs failed to comply with the court rules pertaining to the amendment of a complaint. See MCR 2.116(I)(5) (providing parties with an opportunity to amend their complaint if it was dismissed pursuant to MCR 2.116(C)(8), (9), or (10) as provided in by MCR 2.118); MCR 2.118(A)(2) (parties may amend a pleading only by leave of the court or by written consent of the parties). Here, plaintiffs did not obtain leave of the court to file an amended complaint, nor did they obtain written consent from defendants to do so; therefore, plaintiffs cannot be afforded the relief requested.

VI. Attorney Fees

In Docket No. 245650, Timothy argues that the trial court erred in granting Evergreen’s motion for case evaluation sanctions.⁶ We disagree. This Court reviews de novo a trial court’s decision to grant or deny a motion for case evaluation sanctions. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000).

“[T]he plain language of MCR 2.403(O) requires the trial court to award mediation sanctions if the jury verdict itself, adjusted only as set forth in MCR 2.403(O)(3), is not more favorable to the rejecting party than the mediation evaluation.” *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). For purposes of MCR 2.403(O), a “verdict” includes “a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.” MCR 2.403(O)(2)(c). As there is no contention that the verdict was more favorable to Timothy than the mediation evaluation, we find that the trial court properly awarded case evaluation sanctions in favor of Evergreen pursuant to MCR 2.403.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Christopher M. Murray

⁶ There is no contention on appeal that the amount of sanctions was improper.